



In the Matter of:

BEVERLY CALHOUN,

ARB CASE NO. 04-108

COMPLAINANT,

ALJ CASE NO. 2002-STA-031

v.

DATE: September 14, 2007

UNITED PARCEL SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:

Brian D. Edwards, Esq., Theresa H. Hammond, Esq., *Alston & Bird LLP*, Atlanta, Georgia

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2006). Beverly Calhoun filed a complaint alleging that United Parcel Service (UPS) retaliated against him for engaging in activities protected by the STAA. Following a hearing on the complaint, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O) in which he concluded that UPS violated the STAA. UPS appealed the R. D. & O. to the Administrative Review Board. Following a thorough review of the record, we conclude that Calhoun failed to prove by a preponderance of the evidence that UPS suspended and fired him because he engaged in protected activity. Accordingly, we

reject the ALJ's recommendation that UPS retaliated against Calhoun in violation of the STAA and we deny Calhoun's complaint.

BACKGROUND

This case involves a whistleblower dispute between Calhoun, a truck driver with an excellent safety record and a strong commitment to safe driving, and United Parcel Service, a national package delivery company recognized by federal safety regulators for its safety program.¹ Calhoun worked for UPS for thirty-three years from 1970 until 2003 when he retired with full benefits.² UPS publicly recognized Calhoun in 2002 for his driving record of 32 years without an avoidable accident.³

Calhoun was a feeder driver at UPS's Greensboro hub in North Carolina. A feeder driver is a tractor-trailer driver who delivers packages to a turnaround point, where he or she meets another feeder driver from another facility, exchanges trailers, and returns to his or her point of origin.⁴ These trips are very time sensitive as the large majority of customers require that their packages be delivered overnight or in within 24 hours.

Greensboro is one of UPS's largest hubs with approximately 225 feeder drivers. Nationwide, UPS has about 14,000 drivers.⁵ All UPS feeder drivers and managers receive extensive driver training that includes classroom and hands-on training covering DOT regulations, vehicle inspections, required paperwork, equipment assemblage and vehicle operation under various conditions, and hands-on instruction regarding how to conduct a proper pre-trip inspection of a tractor trailer as required by the Federal Motor Carrier Safety Regulations (FMCSRs).⁶ Two experienced federal regulators testified that UPS's pre-trip methods and practices exceed both the prevailing practice in the industry and the requirements of the regulations.⁷

¹ See e.g., Joint Exhibit (JX) 24, 31; Transcript (Tr.) 1009-1011.

² See *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 1 (ARB Nov. 27, 2002) (*Calhoun I*); see also UPS's Post Hearing Brief at 38.

³ *Calhoun I*, slip op. at 3.

⁴ *Id.*, slip op. at 1-2.

⁵ Tr. 614, 662.

⁶ See *Calhoun I*, slip op. at 6-7 (discussing 49 C.F.R. §§ 392.7 and 396.13, which require drivers to satisfy themselves that their vehicles are in safe operating condition.).

⁷ Tr. 966, 1006-09.

UPS has a preventive maintenance program (exceeding federal regulations) involving thorough mechanical inspections of each tractor (at least every 4 months) and trailers (at least every 9 months).⁸ UPS states that it “has the highest possible safety rating from the Federal Motor Carrier Safety Administration⁹ and experiences equipment-related failures at a rate less than half the national average.”¹⁰

UPS’s industrial engineers have evaluated and established company-wide time allowances for completion of the pre-trip inspection.¹¹ UPS does not require rigid adherence to the letter of its pre-trip methods and practices.¹² The start work allowance for a feeder driver assigned a pre-assembled double is 23.4 minutes and 32.4 minutes if the driver must assemble the unit.¹³ In 2001 Greensboro feeder drivers on Calhoun’s route averaged 36 minutes while Calhoun’s average was between 100 minutes (for a preassembled double) and 109 minutes (assembling of doubles required).¹⁴ UPS’s concern with Calhoun’s consistent and excessive overallowed pre-trip inspections is that Calhoun was often late to his feeder location, which disrupted service and caused late package delivery to customers or caused other workers to work overtime. On the average UPS paid Calhoun \$5,000 per year more than other drivers because of the extra time he took doing the pre-trip inspections. If other UPS drivers were to follow Calhoun’s practices it would cost the company \$76 million per year as well as unhappy customers who had to be compensated for late packages.¹⁵

In January 1998, UPS management reviewed its records and concluded that a number of drivers were over-allowed for their overall paid days.¹⁶ This analysis, and

⁸ Tr. 499-505.

⁹ Respondent’s Exhibit (RX) 1.

¹⁰ UPS’s Post Hearing Brief at 1; *see e.g.*, Tr. at 1009-0012, 1046.

¹¹ Tr. 619-21.

¹² UPS’s Appellate Brief (Respondent’s Brief), Exhibit A at 12.

¹³ Tr. 627-28.

¹⁴ JX 80-81, Tr. 904-906.

¹⁵ *Id.* at 24-25.

¹⁶ JX 80; *Calhoun I*, slip op. at 2. A driver is “over-allowed” when he or she exceeds time allowances, thereby increasing his or her paid day. A “paid day” is the actual pay a driver earns on a particular day. *Id.*

subsequent comparisons, identified Calhoun as the most over-allowed feeder driver at the Greensboro hub.¹⁷ In response, UPS decided to work with Calhoun (and others) to help him reduce his start times.¹⁸

Calhoun filed his first STAA complaint in 1998, alleging that UPS violated the STAA when it implemented some of its efforts to reduce his start times, which included pre-assembling Calhoun's trailers, requiring mechanics to pre-inspect his trailers, requiring him to attend morning meetings, placing restrictions on his restroom breaks, and providing him with written criticism. The ARB issued a Final Decision and Order on that complaint in 2002 in which we affirmed the ALJ's decision (*Calhoun I*). We held that UPS's efforts to reduce Calhoun's start times did not constitute adverse action under the STAA.¹⁹

Meanwhile, Calhoun filed a second STAA complaint on September 29, 1999, alleging that he was subjected to adverse action for conducting a brake test.²⁰ OSHA determined that this complaint lacked merit, and Calhoun objected and requested a hearing before an ALJ. Prior to the hearing, the parties agreed to suspend the proceedings on that complaint pending the outcome of Calhoun's appeal to this Board in *Calhoun I*. The parties stipulated that the ARB's decision in *Calhoun I* would dispose of the issue raised in the second complaint. After we issued *Calhoun I*, the ALJ issued an order allowing the parties an additional opportunity to proceed on Calhoun's second complaint. Neither party responded to the order, and the ALJ issued an order dismissing the second complaint. The ARB issued a Notice of Review and Briefing Schedule, informing the parties that they were permitted to file briefs in support of or in opposition to the ALJ's order. Neither party did so. We therefore affirmed the ALJ's order dismissing the second complaint.²¹

The case now before us is based upon Calhoun's third complaint, filed on December 6, 2001,²² in which he contends that he engaged in STAA-protected activities on nine separate occasions: (1) June 26, 2001; (2) June 27, 2001; (3) June 28, 2001; (4)

¹⁷ See, e.g., JX 81.

¹⁸ *Calhoun I*, slip op. at 6.

¹⁹ *Id.*, slip op. at 11.

²⁰ JX 8.

²¹ See *Calhoun v. United Parcel Serv.*, ARB No. 03-080, ALJ No. 2000-STA-016 (ARB Apr. 29, 2004).

²² JX 11.

June 29, 2001; (5) July 5, 2001; (6) July 10, 2001; (7) September 6, 2001; (8) October 30, 2001; and (9) May 7, 2002.²³ On each of these days, Calhoun admittedly disobeyed the instructions of his supervisors. However, Calhoun contends that the FMCSRs, specifically 49 C.F.R. §§ 392.7 and 396.13, require him to satisfy himself that his equipment is in safe operating condition. He argues that his “refusal to diminish his daily vehicle inspections by eliminating those steps necessary to satisfy himself that his equipment is in safe operating condition are protected activities pursuant to 49 U.S.C. § 31105(a)(1)(B)(i),”²⁴ and that UPS retaliated against him “for his refusal to violate 49 C.F.R. §§ 392.7 and 396.13.”²⁵

Between 1998 and 2002, Calhoun filed at least forty-five grievances in which he claimed UPS was interfering with his ability to conduct his personally preferred pre-trip inspection.²⁶ UPS contends that except for the grievances related to his suspensions and termination and discussed later in this opinion, it has no record of any action being taken in response to Calhoun’s complaints.²⁷

OSHA conducted an investigation based on Calhoun’s third complaint and concluded that UPS did not violate the STAA.²⁸ Calhoun objected to OSHA’s findings and requested a hearing.²⁹ The ALJ conducted a hearing on November 4-6, 2003. Both parties presented witnesses and exhibits.

On June 2, 2004, the ALJ issued an R. D. & O. in which he concluded that, on some of the dates specified, UPS violated the STAA by suspending Calhoun and terminating his employment for conducting certain components of his pre-trip inspection.³⁰ The ALJ awarded Calhoun back pay and compensatory damages for emotional distress. The ALJ also ordered UPS to post copies of the R. D. & O. “in

²³ R. D. & O. at 36-43; JX 11 at 2-6.

²⁴ JX 11 at 3.

²⁵ *Id.* at 8. The reference to 49 C.F.R. §§ 392.3 on this page appears to be a typographical error.

²⁶ JX 32-33.

²⁷ UPS’s Post Hearing Brief at 21.

²⁸ JX 14.

²⁹ JX 15.

³⁰ R. D. & O. at 37, 39-42.

prominent places on the premises of all UPS terminals for sixty days.”³¹ The case is now before the Board pursuant to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.³² When reviewing STAA cases, the Board is bound by the ALJ’s factual findings if those findings are supported by substantial evidence on the record considered as a whole.³³ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³⁴ In reviewing the ALJ’s legal conclusions, the Board, as the Secretary’s designee, acts with “all the powers [the Secretary] would have in making the initial decision....”³⁵ Therefore, the Board reviews the ALJ’s legal conclusions de novo.³⁶

DISCUSSION

I. Legal Standard

The STAA protects employees who engage in certain activities from adverse employment actions. The Act provides that an employer may not “discharge,” “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order”³⁷

³¹ *Id.* at 47.

³² 49 U.S.C.A. § 31105(b)(2)(C); *see* Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(c).

³³ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

³⁴ *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

³⁵ 5 U.S.C.A. § 557(b) (West 1996).

³⁶ *Id.*; *see Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

³⁷ 49 U.S.C.A. § 31105(a)(1)(A).

Protection is also afforded under the Act where an employee “refuses to operate a vehicle because ... the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health”³⁸ A refusal to operate a vehicle may also be premised on an employee’s “reasonable apprehension of serious injury to [oneself] or the public because of the vehicle’s unsafe condition.”³⁹ The STAA provides that “an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.”⁴⁰ To qualify for protection under the reasonable apprehension prong the employee “must have sought from the employer, and been unable to obtain, correction of the unsafe condition.”⁴¹

To prevail on his claim, Calhoun must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) UPS was aware of the protected activity; (3) UPS discharged, disciplined, or discriminated against him; and (4) the protected activity was the reason for the adverse action.⁴²

In STAA cases, the Board adopts the burdens of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act.⁴³ Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and

³⁸ 49 U.S.C.A. § 31105(a)(1)(B)(i).

³⁹ 49 U.S.C.A. § 31105(a)(1)(B)(ii).

⁴⁰ 49 U.S.C.A. § 31105(a)(2).

⁴¹ *Id.*

⁴² *BSP Trans, Inc.*, 160 F.3d at 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004).

⁴³ *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 03-STA-001, 03-STA-002, slip op. at 4-5 (ARB Oct. 27, 2004); *Densienski*, slip op. at 4. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-035, slip op. at 5-6 (ARB June 28, 2002).

that the employer took adverse action against the complainant because of the protected activity. Only if the complainant makes this prima facie showing does the burden of production shift to the employer to articulate a legitimate, non-discriminatory reason for the adverse action.

If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination.⁴⁴ At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence.⁴⁵

When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case."⁴⁶

Thus, after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.⁴⁷ As the Supreme Court observed in *U.S. Postal Serv. Bd. of Governors v. Aikens*, "Because this case was tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*."⁴⁸ The Secretary of Labor further explained in *Carroll v. Bechtel Power Corp.*:⁴⁹

⁴⁴ *Calhoun I*, slip op. at 5.

⁴⁵ *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-001, slip op. at 6 n.1 (ARB Apr. 30, 2004); *Jenkins*, slip op. at 18. *Cf. Reeves*, 530 U.S. at 143; *McDonnell Douglas Corp.*, 411 U.S. at 802.

⁴⁶ *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. at 255 n.10.

⁴⁷ *Schlagel*, slip op. at 6 n.1; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-033, slip op. at 9 n.9 (ARB Oct. 31, 2003), *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-031, slip op. at 6 n.12 (ARB Sept. 30, 2003), *Simpkins v. Rony Co., Inc.*, ARB No. 02-097, ALJ No. 2001-STA-059, slip op. at 3 (ARB Sept. 24, 2003), *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 7-8 n.11 (ARB Mar. 29, 2000).

⁴⁸ 460 U.S. 711, 713-714 (1983)(footnote omitted).

⁴⁹ No. 91-ERA-046 (Sec'y Feb. 15, 1995).

Once the respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a prima facie case is no longer particularly useful. “The [trier of fact] has before it all the evidence it needs to determine whether ‘the defendant intentionally discriminated against the plaintiff.’” USPS Bd. of Governors v. Aikens, 460 U.S. at 715 (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. at 253 (emphasis supplied)).^{50]}

Accordingly, the Board will decline to discuss an ALJ’s findings regarding the existence of a prima facie showing in a case the ALJ has fully tried on the merits.⁵¹

Calhoun has alleged that he engaged in protected activity on nine specific days and that he suffered various adverse actions as a result of his protected activity. UPS argues that Calhoun did not engage in protected activity under the STAA on any of those days and that, while UPS did take adverse actions against Calhoun, UPS had a legitimate, nondiscriminatory reason for the adverse actions and that Calhoun has not shown these reasons to be pretext.

Although the basis for Calhoun’s contention that he engaged in protected activity is not entirely clear, we agree with the ALJ’s interpretation of Calhoun’s argument i.e., that Calhoun “asserts that failure to assure himself that his assigned commercial vehicles were in good working order and safe operating condition before he operated them on the highways would have resulted in actual violations of the generalized safety regulations set out at 49 C.F.R. 392.7 and 396.13.”⁵² These sections provide in pertinent part:

§ 392.7

No commercial vehicle shall be driven *unless the driver is satisfied that the following parts and accessories are in good working order*, nor shall any driver fail for use or make use of such parts and accessories when and as needed.....

⁵⁰ *Id.*, slip op. at 11.

⁵¹ *Andrae v. Dry Ice, Inc.*, ARB No. 97-087, ALJ No. 95-STA-024, slip op. at 2 (ARB July 17, 1997).

⁵² R. D. & O. at 26.

§ 396.13

Before driving a motor vehicle, the driver shall:

- (a) *Be satisfied that the motor vehicle is in safe operating condition;*
- (b) Review the last driver inspection.....

Discussing each of the elements of Calhoun’s case in turn, we begin with Calhoun’s allegations of protected activity under the STAA.

II. Protected Activity

A. Calhoun’s general dissatisfaction with UPS’s pre-trip inspection methods does not constitute protected activity.

Calhoun argues that he has the responsibility under the FMCSRs to assure himself that the truck is in safe operating condition before he drives it. He argues that he has the right to conduct the inspection to his standards no matter how long it takes him to do so. Calhoun testified that, although he did not know how UPS’s inspection standards compared to the rest of the trucking industry, UPS was “probably pretty safe.”⁵³ The ALJ found that UPS’s inspection procedures were reasonable.⁵⁴ Nevertheless, the ALJ concluded that “Calhoun’s inspections in the face of instructions to adhere simply to the UPS inspection regimen and his well-documented displeasure with the UPS inspection regimen constitute protected complaints under the act.”⁵⁵ The ALJ reached this conclusion of law by deciding that Calhoun could exceed UPS’s inspection guidelines by invoking the FMCSRs, specifically 49 C.F.R. §§ 392.7⁵⁶ and 396.13,⁵⁷ which require drivers to confirm that their vehicles are in safe operating condition. We disagree.

⁵³ Tr. 293-94.

⁵⁴ R. D. & O. at 35.

⁵⁵ *Id.* at 44.

⁵⁶ 49 C.F.R. § 392.7 provides that:

No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:
Service brakes, including trailer brake connections.
Parking (hand) brake.
Steering mechanism.
Lighting devices and reflectors.

We concur with the ALJ's conclusion that Calhoun may complain about the safety of his vehicle during or following inspections pursuant to 49 C.F.R. §§ 392.7 and 396.13. However, under the complaint clause of the STAA, Calhoun must at least be acting on a reasonable belief regarding the existence of a safety violation.⁵⁸ This standard requires Calhoun to prove that a person with his expertise and knowledge would have a "reasonable belief" that UPS's inspection methods were in violation of the regulations and that Calhoun's use of the UPS pre-trip inspection methods would lead Calhoun to reasonably believe that the truck was not in good operating order and safe to drive.⁵⁹

Not only is the record devoid of evidence indicating that UPS's pre-trip inspection methods violate the FMCSRs, there is substantial evidence to the contrary. The record shows that the United States Department of Transportation (DOT) conducted an inspection of the Greensboro hub's pre-trip inspections, at Calhoun's insistence, and concluded that UPS allowed its drivers to conduct thorough pre-trip inspections.⁶⁰ The record also contains expert testimony that UPS's pre-trip methods exceed both industry practice and the requirements of the FMCSRs.⁶¹ And despite the fact that other UPS drivers testified that they sometimes inspect components of their vehicles beyond the UPS requirements, they did not indicate that UPS procedures were inadequate or unsafe. We therefore conclude that while Calhoun had a general dissatisfaction with UPS's

Tires.
Horn.
Windshield wiper or wipers.
Rear-vision mirror or mirrors.
Coupling devices.

⁵⁷ 49 C.F.R. § 396.13 provides that "[b]efore driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition"

⁵⁸ *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 02-STA-005, slip op. at 3 (ARB July 31, 2003).

⁵⁹ *See, e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, ALJ No. 2003-SOX-15, slip op. at 10 (ARB May 31, 2007) (under Sarbanes-Oxley Act of 2002); *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 123 Fed.Appx. 558, 564, (4th Cir. 2005) (Niemeyer, J., dissenting) (Under Title VII, "reasonable belief" under the "protected activity" test contains both a subjective and an objective component.).

⁶⁰ JX 24.

⁶¹ Tr. 966, 1008-09, 1027-28.

inspection methods, he did not hold a “reasonable belief” that the UPS methods were in violation of the FMCSRs.

B. “Driving under protest” is not a “refusal to drive” under 49 U.S.C.A. §§ 31105 (a)(1)(B)(i) or (ii).

On June 26, June 29, July 10, and September 6, 2001, Calhoun “drove under protest” because he was not able to conduct the pre-trip inspection according to his own methods but was required to use the UPS methods. On June 28, 2001, he declined to drive and UPS got another driver to drive Calhoun’s route. He argues that he engaged in protected activity under the STAA’s “refusal to drive” provisions on those days.

The ALJ correctly cites *Zurenda v. J & R Plumbing & Heating Co., Inc.*,⁶² for the proposition that “to establish that he engaged in protected activity, Calhoun must first show that he refused to drive his assigned vehicle.”⁶³ The ALJ erred as a matter of law when he proceeded to conclude that “Calhoun’s refusal to drive until he completed his pre-trip inspections satisfies the requirement that he refused to drive.”⁶⁴ He reasons “Calhoun’s refusal to drive was conditioned on completing his inspections of his vehicle, and I find that a conditional refusal to drive satisfies the refusal to drive” element of Calhoun’s prima facie case.”⁶⁵ He distinguishes *Zurenda* and other cases but cites no legal authority for his novel interpretation of the law.

Based on this interpretation the ALJ concluded that Calhoun refused to drive pursuant to the STAA on June 26, June 28, June 29, July 10, and September 6, 2001, when he conducted pre-trip inspections that were inconsistent with UPS methods. The ALJ identified specific components of Calhoun’s pre-trip inspection method and examined whether it was “reasonable” for Calhoun to perform each of those components.⁶⁶ The ALJ next determined which pre-trip inspection steps Calhoun performed on the dates relevant to this case. The ALJ then concluded that Calhoun engaged in protected activity on the dates he performed “reasonable” tasks as a part of his pre-trip inspection.⁶⁷

⁶² ARB No. 98-088, ALJ No. 97-STA-016 (ARB June 12, 1998).

⁶³ R. D. & O. at 23.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ R. D. & O. at 29-35.

⁶⁷ *Id.* at 36-44.

The ALJ erred in his interpretation of the law. According to the plain language of 49 C.F.R. §§ 31105 (a)(B)(i or ii) protection under this section is available if one “refuses to drive.” The record indicates that, with the exception of June 28, 2001, Calhoun drove his vehicle on the dates he alleges he conditionally refused to drive.⁶⁸ Calhoun cannot seek protection under the refusal to drive clause on the days he drove his vehicle.⁶⁹

With respect to June 28, 2001, Calhoun conducted his pre-trip inspection in the presence of Don Allen, his supervisor, and Randall Williams, a UPS shop steward. Calhoun began conducting his inspection as he had on previous occasions. Allen interrupted the inspection and told Calhoun that he had seen no effort by Calhoun to comply with suggestions he had received over the previous two days.⁷⁰ When Calhoun continued his inspection he touched lug nuts, cleaned the interior of his cab, and handled hoses in defiance of Allen’s instructions not to do so. Allen stopped Calhoun again and asked him to step down from the cab. The ALJ found that “Calhoun was being rebellious at this point, and Allen and Williams accompanied him back upstairs to the office.”⁷¹ UPS asked Calhoun if he was going to drive his route and Calhoun said no, he was too upset. UPS found someone else to complete his run.

Calhoun did not drive on June 28, 2001, because he elected to take himself out of service.⁷² As we indicate above, Calhoun did not refuse to drive because to he was concerned about an actual violation of a FMCSR or because he had a reasonable concern about injury to himself or the public because of his vehicle’s unsafe condition. He did not assert that either of these conditions existed on June 28, 2001. We conclude that

⁶⁸ See, e.g., JX 33 at D-000553, 565, 572, 583, 593; JX 47; JX 54 at D-000586.

⁶⁹ See, e.g., *Zurenda*, slip op. at 5 (“Although *Zurenda* alleged that he complained about the condition of the trucks he was to drive on these dates, and ‘refused’ to drive them, in fact he did drive the trucks in question,” and therefore, his case “more appropriately [fell] within the complaint provision of the STAA.”). The ALJ attempts to distinguish *Zurenda* by concluding that Calhoun’s inspections constituted “conditional” refusals to drive. As we indicate above, neither the language of the STAA nor the applicable case law recognize conditional or implied refusals to drive.

⁷⁰ R. D. & O. at 38, citing Tr. 799.

⁷¹ *Id.*

⁷² See JX 46 at D-000548 (Allen notes attached to June 28, 2001 Start Work Audit) (“Randall asked if we could get someone else to run Beverly’s run because Beverly was too upset to continue working. I asked Beverly if he felt ok to continue or is it time he wanted to take himself ‘out of service.’ He replied saying he was too stressed out and upset to continue. I said ok I’ll get someone else to run your run.”).

Calhoun did not engage in protected activity under the refusal to drive provisions of the STAA on June 28, 2001.

C. Calhoun Engaged in Protected Activity Pursuant to the STAA’s “Complaint Clause” on June 26, June 27, July 6, 2001, and September 6, 2001, by communicating safety concerns to UPS.

The ALJ concluded that Calhoun’s inspections on June 26, June 28, June 29, July 10, and September 6, 2001, are protected under the STAA’s complaint clause because “some aspects of Calhoun’s pre-trip inspections were reasonable.”⁷³ We disagree.

Internal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial.⁷⁴ However, such complaints cannot be implied. They must be communicated to a manager or supervisor.⁷⁵ Specific components of Calhoun’s pre-trip inspection such as touching the lug nuts or the brake hoses, standing alone, did not convey to UPS that Calhoun was aware of specific vehicle defects on the dates relevant to this case or that UPS’s methods were in violation of the STAA.⁷⁶ The employee protection provision of the STAA requires an employee to communicate his or her concerns by either refusing to drive or initiating a complaint. We therefore reject the ALJ’s conclusion that Calhoun’s added inspections, standing alone, constituted complaints pursuant to the STAA.⁷⁷

We now review the ALJ’s conclusions as to protected activities under the complaint clause. In particular, we must determine what the record reveals regarding Calhoun’s specific complaints to UPS about violations of the FMCSRs.⁷⁸

⁷³ R. D. & O. at 44.

⁷⁴ See, e.g., *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002).

⁷⁵ *Id.*

⁷⁶ Although we disagree with his conclusion that Calhoun refused to drive, the ALJ found that “Calhoun has not established that, at the times he refused to drive, there were any indications that his assigned vehicles were unsafe.” R. D. & O. at 25.

⁷⁷ We also reject the ALJ’s assertion that “Calhoun’s inspections in the face of instructions to adhere simply to the UPS inspection regimen and his well-documented displeasure with the UPS inspection regimen constitute protected complaints under the act.” R. D. & O. at 44.

⁷⁸ This case was litigated prior to the enactment of amendments to the STAA redefining the scope of protected activity. See *Implementing Recommendations of the 9/11 Commission Act of 2007*, Pub. L. No. 110-053 (2007).

1. June 26, 2001

On June 26, 2001, Calhoun had an on-the-job supervision (OJS) ride with Allen. Before the start of the OJS, Allen observed Calhoun conduct his pre-trip inspection. During that inspection Calhoun touched lug nuts, belts, hoses, and engine-compartment steering components, and he also performed an unapproved brake test. When Calhoun proceeded to wipe down the dash, steering wheel, gear shifter and buttons inside his vehicle, Allen told Calhoun that he was not adhering to UPS pre-trip methods.⁷⁹

The ALJ held that Calhoun engaged in protected activity because he manually continued to inspect components of his vehicle in defiance of Allen's instructions.⁸⁰ We disagree. A driver engages in protected activity under the STAA by either refusing to drive or making a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order. Calhoun did not engage in protected activity simply by inspecting his vehicle in defiance of UPS methods. As we indicate above, complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial, but they must be communicated to a manager or supervisor.⁸¹

However, Calhoun testified that prior to the OJS ride, he told Allen about a malfunctioning dolly latch he discovered while attempting to build his double trailer set.⁸² The defective latch prevented Calhoun from properly assembling his trailers. Allen allowed Calhoun to take the trailer to be checked by a mechanic.⁸³ We therefore conclude that Calhoun engaged in protected activity on June 26, 2001, by complaining to Allen about a malfunctioning dolly latch.

2. June 27, 2001

Allen observed Calhoun conduct his pre-trip inspection on June 27, 2001. He wiped off reflective strips and lights, and touched air lines during his inspection. Allen

⁷⁹ R. D. & O at 36; Tr. 89, 112, 123-24.

⁸⁰ R. D. & O. at 36 ("Manually inspecting lug nuts, belts, hoses, and steering components are protected activities. Manual inspection of brake lines is also protected activity. Calhoun has established that he performed all of these activities on June 26, 2001.").

⁸¹ *Id.*

⁸² Tr. 90-93.

⁸³ *Id.* at 94.

told Calhoun not to touch air lines but Calhoun did so anyway because he had been “finding problems” with air lines.⁸⁴ Calhoun increased his inspection time as compared to the previous day because he was “exaggerating his inspections.”⁸⁵ At the end of the OJS ride, Allen also told Calhoun that “touching hands on everything is not necessary nor recommended.”⁸⁶

The ALJ found that “Calhoun discovered an air leak at the rear valve of the trailer using UPS inspection methods.”⁸⁷ Calhoun testified that he took his vehicle to the shop to have mechanics check his dolly brakes. Additionally, the Start Work Audit generated that day indicates that Allen was aware that Calhoun had a “breakdown on property” involving a problem with the dolly brakes and replacement of both short lines. We therefore conclude that Calhoun engaged in protected activity on June 27, 2001, by informing UPS about a problem with his brake system.⁸⁸

3. June 28, 2001

As indicated above, Calhoun conducted his inspection on June 28, 2001, by touching lug nuts, cleaning the interior of his cab, and handling hoses in defiance of Allen’s instructions not to do so. The ALJ found that Calhoun was being rebellious that day, and the record does not indicate that Calhoun made a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order. We therefore conclude that Calhoun did not engage in STAA-protected activity on June 28, 2001.

4. June 29, 2001

The ALJ concluded that Calhoun engaged in protected activity on June 29, 2001. He described Calhoun’s actions that day:

⁸⁴ *Id.* at 112.

⁸⁵ R. D. & O. at 38, citing Tr. 795-6.

⁸⁶ Tr. 117; JX 45 at D-000543. The ALJ incorrectly cites to Calhoun’s testimony at page 117 of the Transcript and the discussion of JX 45 as relevant to June 26, 2001. *See* R. D. & O. at 36.

⁸⁷ R. D. & O. at 38.

⁸⁸ The ALJ held, citing page 131 of the transcript, that on June 27, 2001, Calhoun “asked Allen to be left alone during his inspection because he wanted to check the air lines and because the truck is his responsibility from the moment he picks up the keys in the morning until he turns them in at night.” R. D. & O. at 38. Page 131 of the transcript contains Calhoun’s description of what he told Allen on June 29, 2001. *See* Tr. 131.

On June 29, 2001, Allen completed yet another work audit of Calhoun, who seemed to improve slightly in his hand-checking of parts. However, as if to compensate for not touching things, he spent more time on his scan (Tr. 802). Calhoun also began separating the doubles, at which point Allen stopped him. Calhoun became belligerent and insisted that he needed to check the coupling devices (Tr. 802-3). At the end of his start-work routine, Allen, Calhoun, Williams and Byron Tucker met regarding his one-day suspension. It was decided that he would be taken out of work for his next scheduled work day (Tr. 804). Calhoun was advised that he needed to make some changes in his start-work routine to avoid further disciplinary action.⁸⁹

Nothing in this description indicates that Calhoun engaged in STAA-protected activity on June 29, 2001. Calhoun testified that he told Allen that he “want[ed] to be left alone to check [his] equipment properly,” but could not recall exactly what he had said because “[he] talked with him so much by that time, [he] was getting a little bit hot.”⁹⁰

As we have stated, Calhoun did not automatically engage in protected activity by conducting his pre-trip inspection. He did not inform Allen or anyone else at UPS that his vehicle was unsafe or that Allen’s instructions were in violation of the FMCSRs. We conclude that Calhoun has failed to prove that he engaged in protected activity on June 29, 2001.

5. July 5, 2001

Allen accompanied Calhoun during his pre-trip inspection on July 5, 2001.⁹¹ On this day Calhoun also shut down the air brake system and disconnected air lines to visually inspect the seal inside the glad hands in contravention of the UPS inspection methods. Allen testified that Calhoun had not done this on any of the days they had worked together.⁹² Calhoun admitted that this action exceeded UPS methods, and during the hearing he admitted that an air leak could be audibly detected unless it was “minute or

⁸⁹ R. D. & O. at 39.

⁹⁰ Tr. 131-32.

⁹¹ *Id.* at 133. Calhoun also took twelve minutes to inspect his tractor, more than double the time allotted by UPS. Tr. at 807-09; JX 49.

⁹² Tr. 806.

small.”⁹³ In response, Allen prepared a Start Work Audit indicating that Calhoun had not performed a proper inspection because he turned off the air brake system to inspect the seals on the brake lines.⁹⁴

Calhoun’s insistence on substituting his own methods for UPS’s established methods does not constitute a complaint pursuant to the STAA unless he expresses a reasonable and specific concern about the safety of his vehicle or a violation of the FMCSRs. We therefore conclude that Calhoun did not engage in protected activity on July 5, 2001.

6. July 6, 2001

Allen accompanied Calhoun during his pre-trip inspection on July 6, 2001. Allen generated a Start Work Audit indicating that, although Calhoun “over extended his pre-trip,” it was the “first day [he] felt [Calhoun] showed a sense of urgency.”⁹⁵

Before leaving the yard, Calhoun had difficulty maintaining the air pressure in his brake system, which he contends may have indicated a problem with a drain cable, compressor, seal ring, or spitter valve.⁹⁶ The Start Work Audit Allen generated on that day indicates that Calhoun experienced a “breakdown on property” because of “low air pressure.”⁹⁷

The ALJ found that “the truck was taken to the shop and the leak fixed.”⁹⁸ The ALJ also found that, although the air pressure had not reached the correct level, Allen told Calhoun to leave the yard anyway.⁹⁹ Calhoun testified that he did not think that he had completed a proper pre-trip inspection and felt rushed through it.¹⁰⁰

⁹³ *Id.* at 139.

⁹⁴ JX 49.

⁹⁵ JX 50 at D-000567.

⁹⁶ Tr. 143.

⁹⁷ JX 50 at D-000566. In the section titled “Proper Pre-Trip,” Allen wrote “good effort demonstrated, checked all items, still taking longer on [illegible] inspection than he should.” *Id.*

⁹⁸ R. D. & O. at 40.

⁹⁹ *Id.*, citing Tr. 514-5 (Testimony of Thomas Hope, another UPS driver).

¹⁰⁰ R. D. & O. at 9, citing Tr. 532-36 (Testimony of Hope). During the hearing, Calhoun confirmed that on July 6, 2001, he “probably” stated the following to one of his shop

Calhoun contends that he “drove under protest” on July 6, 2001.¹⁰¹ Driving under protest does not constitute a refusal to drive under the STAA. However, Calhoun complained to UPS about his vehicle’s unsafe condition by informing Allen that he could not leave the yard due to low air pressure. We therefore conclude that Calhoun engaged in protected activity on July 6, 2001.¹⁰²

7. July 10, 2001

Allen observed Calhoun conduct his pre-trip inspection on July 10, 2001. During his inspection Calhoun rubbed his hands up and down the brake lines. He also looked under the cab door area and the rear of the truck, and drained “all the air off the dolly,” which UPS did not consider a necessary inspection step.¹⁰³ Allen testified that Calhoun was “over exaggerating his inspections” and “had no sense of urgency about running the schedule or his departure time.”¹⁰⁴ Allen testified that Calhoun told him that he did not believe in the UPS pre-trip inspection methods and would check what he deemed necessary.¹⁰⁵

As we have stated, Calhoun did not automatically engage in protected activity by conducting his inspection. He did not inform Allen or anyone else at UPS that his vehicle was unsafe or that a regulation was being violated. Nor do we interpret Calhoun’s opinions about UPS methods to constitute safety complaints under the STAA. By July 10, 2001, Allen was already aware of Calhoun’s opinion of UPS methods. His statements that day did not convey to Allen that Calhoun was aware of a safety violation that precluded him from driving his vehicle. We therefore conclude that Calhoun has failed to prove that he engaged in protected activity on July 10, 2001.

stewards: “I’m checking my equipment, I don’t give a shit what they say. As quick as we get done with this bullshit, I’m going right back to checking my equipment.” Tr. 383.

¹⁰¹ JX 33 at D-000568 (“I have left again this morning not satisfied with my equipment.”).

¹⁰² In concluding that Calhoun engaged in protected activity on July 6, 2001, the ALJ erred by concluding that Calhoun refused to drive by complaining about the brake system. R. D. & O. at 40. Because Calhoun drove his vehicle on July 6, he did not refuse to drive.

¹⁰³ Tr. 801.

¹⁰⁴ *Id.* at 811.

¹⁰⁵ *Id.* at. 821 (“he had made some statements that he did not believe in UPS methods and he was going to look at it regardless what we told him and he was going to do it his way and to satisfy himself”).

8. September 6, 2001

Calhoun started the day on September 6, 2001, by meeting with Allen and Harry Wolfe, UPS's Feeder On Road Manager. They asked Calhoun to make an effort do reduce his start times. Calhoun testified that he told them that he could not commit to following UPS's methods.¹⁰⁶

Allen observed Calhoun conduct his pre-trip inspection on September 6, 2001. During the inspection Calhoun inspected components of his vehicle in contravention of UPS guidelines and Allen's previous instructions.¹⁰⁷ Calhoun also performed brake tests on his vehicle pursuant to UPS guidelines. Calhoun testified that he informed Allen that he needed to have the dolly brake checked at the UPS shop because it did not "look right," and that Allen told him "the brake test felt okay" and he needed to "move on and go."¹⁰⁸ Calhoun drove to Carnesville, Georgia, where a UPS vendor in Carnesville adjusted the brake.¹⁰⁹ On September 11, 2001, UPS issued a letter to Calhoun indicating that it intended to terminate his employment for failing to "use proper UPS pre-trip methods."¹¹⁰

Calhoun's request to have the dolly brake checked could be construed as a complaint that his truck could not be driven. We distinguish this statement from Calhoun's general complaints about the adequacy of UPS's inspection methods because he was complaining about an actual defect in the vehicle he was assigned to drive. We therefore conclude that Calhoun engaged in protected activity on September 6, 2001, when he complained about the condition of his vehicle.

9. October 30, 2001, and May 7, 2002

UPS mechanics assembled some drivers' double-trailer sets to reduce their paid days. *Calhoun I*, slip op at 6-7. On October 30, 2001, Calhoun was assigned a preassembled trailer but pulled his "trailers apart to check the dolly and put them back together after finding nothing wrong with them."¹¹¹ In response, UPS initiated a second

¹⁰⁶ *Id.* at 389.

¹⁰⁷ JX 54.

¹⁰⁸ Tr. 158-59.

¹⁰⁹ *Id.* at 162-63, 165.

¹¹⁰ JX 56. The reference to September 7, 2001, in the letter instead of September 6, 2001, is a typographical error. Tr. 169-70.

¹¹¹ R. D. & O. at 43.

termination of Calhoun's employment. On May 7, 2002, Calhoun again pulled his trailers apart "even though he had no specific reason for doing so."¹¹² In response, UPS issued Calhoun's third employment termination.

Calhoun's actions in separating his doubles were not complaints related to motor vehicle safety. Unlike the circumstances on June 26, 2001, (when his doubles could not be coupled because of the malfunctioning dolly latch), Calhoun had no reason to believe that his trailers had not been properly assembled.

We conclude that Calhoun has proven that he engaged in protected activity on June 26, June 27, July 6, and September 6, 2001. Next we determine whether UPS disciplined, discharged, or discriminated against Calhoun in retaliation for his activities on those days.

III. Adverse Action

1. UPS did not subject Calhoun to adverse action by supervising his pre-trip inspections.

In his complaint, Calhoun alleges that UPS retaliated against him by conducting "excessive supervision" because of "his refusal to violate 49 C.F.R. §§ 392.3 and 396.13."¹¹³ We disagree. As we note above, Calhoun's interpretation of his rights pursuant to the FMCSRs is unreasonable. The attention and instruction he received from UPS did not constitute discrimination with regard to his pay, terms, or privileges of employment because UPS took legitimate actions designed to reduce the amount of time Calhoun was spending on his pre-trip inspection. We therefore conclude that UPS did not subject Calhoun to adverse action by supervising his pre-trip inspections.

2. Other Adverse Action

In his complaint Calhoun contends that UPS retaliated against him by issuing warnings, suspensions, or discharges on (1) July 2, 2001, for engaging in protected activity on June 26, 2001; (2) July 2, 2001, for engaging in protected activity on June 28, 2001; (3) July 18, 2001, for engaging in protected activity on July 10, 2001; (4) September 11, 2001, for engaging in protected activity "on September 7, and previous occasions;" and on (5) October 31, 2001.¹¹⁴

¹¹² *Id.*

¹¹³ JX 11 at 8.

¹¹⁴ JX 11 at 7-8.

The record indicates that UPS subjected Calhoun to adverse actions on June 28, 2001 (warning and suspension), July 10, 2001 (three-day suspension), September 6, 2001 (termination), October 30, 2001 (termination), and May 7, 2002 (termination).¹¹⁵ However, the record does not support either Calhoun's contention or the ALJ's finding that UPS subjected Calhoun to adverse employment actions on any other dates.

The ALJ held, citing pages 118-20 of the transcript, that UPS subjected Calhoun to adverse action on June 26, 2001.¹¹⁶ These pages do not support the ALJ's finding, as they contain testimony describing events that transpired on June 28, 2001. Calhoun's complaint does not allege that UPS subjected him to adverse action on June 26, 2001, and there is no other evidence supporting the ALJ's finding. We therefore conclude that the ALJ's finding is not supported by substantial evidence, and Calhoun has not proven that UPS subjected him to adverse action on June 26, 2001.

We concur with the ALJ's finding that Calhoun presented no evidence that UPS subjected him to adverse action on June 27, 2001.¹¹⁷ However, the ALJ erred in finding that "[o]n June 29, 2001, Calhoun was taken out of work for the next day."¹¹⁸ The record does not indicate that Calhoun suffered adverse action on June 29 or 30, 2001, or that any of Calhoun's suspensions or terminations were in retaliation for Calhoun's activities on June 29, 2001.¹¹⁹ Noteworthy is the fact that, in the portion of the R. D. & O. awarding damages, the ALJ does not order UPS to reimburse Calhoun for any lost pay on either June 29 or June 30, 2001.

We also conclude that there is no evidence in the record that UPS disciplined Calhoun for complaining about the air pressure in his brake system on July 6, 2001,¹²⁰ or that Calhoun was subjected to any adverse employment action for his actions on June 27,

¹¹⁵ JX 44-58, 66.

¹¹⁶ R. D. & O. at 37.

¹¹⁷ *Id.* at 38; *see also* Complainant's Brief Partially in Support of, and Partially in Opposition to, the Recommended Decision and Order (Complainant's Brief) at 23-24.

¹¹⁸ R. D. & O. at 40.

¹¹⁹ *See* Complainant's Reply Brief at 9, citing Tr. 194, JX-34, and JX-42.

¹²⁰ In discussing the events of July 5 and 6, 2001, the ALJ found that UPS did not subject Calhoun to adverse actions on July 5, 2001, and he says nothing about July 6, 2001. At the end of the R. D. & O., the ALJ states, without explanation, that Calhoun is entitled to damages for a July 6, 2001 suspension. R. D. & O. at 47.

2001.¹²¹ The record does not indicate that Calhoun was disciplined for informing Allen of the malfunctioning dolly latch on June 26, 2001.

Finally, we agree with the ALJ's conclusion that UPS did not subject Calhoun to adverse action on July 5, 2001, by monitoring his pre-trip inspection and generating a start-work audit memorializing Calhoun's inspection efforts.¹²² We therefore conclude that UPS subjected Calhoun to adverse action on June 28, July 10, September 6, and October 30, 2001, and May 7, 2002.¹²³

IV. UPS articulated a legitimate nondiscriminatory reason for taking progressive disciplinary action against Calhoun.

UPS argues it warned and suspended Calhoun and terminated his employment because he refused to follow instructions and otherwise cooperate with UPS's legitimate efforts to reduce his excessive start-work times. Specifically, it took disciplinary action because of Calhoun's extremely poor performance causing frequent serious and costly business problems, his failure to follow instructions designed to prevent problems from occurring,¹²⁴ and his failure to cooperate in any way with efforts to reduce his start work times.¹²⁵ We conclude that this is an articulation of a legitimate, nondiscriminatory reason for the adverse actions, and that the burden therefore is on Calhoun to prove that this reason is pretext, and that the real reason for the adverse action is retaliation for engaging in protected activity.

¹²¹ *Id.* at 38.

¹²² R. D. & O. at 40-41, citing *Calhoun I*. In *Calhoun I* we held that, although documents such as the start work audits "contain negative comments regarding Calhoun's job performance, the purpose of the documentation was to record that training or instruction took place or to serve management as a tool; these documents do not provide the basis for subsequent employment decisions with respect to discipline, compensation, or job assignments." *Calhoun I*, slip op. at 9.

¹²³ We concur with the ALJ's conclusion that UPS did not violate the STAA by disciplining Calhoun on October 30, 2001, and May 7, 2002, for separating double trailers that had been pre-assembled for him because separating his doubles did not constitute protected activity. R. D. & O. at 43.

¹²⁴ Tr. 173-175, 192-193, 390-91, 679-87, 822-24; JX 58, 65-66.

¹²⁵ Tr. 375, 390, 818-19, 823; JX 84 at 113-115, 182-183.

V. Calhoun did not prove by a preponderance of the evidence that the UPS's legitimate non discriminatory reasons were pretext.

The record reflects that UPS has been working with Calhoun since the mid-1990's to attempt to reduce his start-times. In 1998, Calhoun was the most "overallowed" driver at the Greensboro hub with respect to his start times. Calhoun testified that UPS had many conversations with him and that he essentially ignored UPS's instructions. He testified that he basically did nothing to reduce his overallowances. UPS began working with Calhoun again in 2001. Again, Calhoun essentially did nothing to improve. He was belligerent, disrespectful and verbally abusive to his supervisors and refused to follow Allen's instructions i.e., UPS's pre-trip inspections methods. Calhoun, himself, described the UPS methods in his testimony as "probably pretty safe. And, using these methods for pre-trip inspections, UPS trucks are placed "out of service" by federal and state enforcers at a rate that is one-half the rate of other trucks on the highways.

UPS presented testimony that the costs to the company were potentially enormous. If all drivers at UPS decided to take Calhoun's approach to pre-trip inspections, it would cost the company \$76 million per year in wages and loss of business and reputation due to the inability to get packages delivered to customers in the 24 hours promised. The package delivery business is very time sensitive.

Calhoun made clear that he preferred his own pre-trip inspection methods to those developed by experienced motor carrier safety professionals within UPS. Calhoun called the DOT and requested an inspection focusing on UPS's pre-trip inspections. DOT conducted an inspection of three drivers conducting pre-trip inspection at the Greensboro hub and stated that all drivers checked the necessary components and that the inspections took from 35 to 55 minutes. All drivers felt they had enough time to conduct the pre-trip inspection. The investigation revealed that drivers conducted quality pre-trip inspections, the investigator found no defects, and the investigator was confident that these were typical of the pre-trip inspections conducted at the Greensboro hub.¹²⁶

Calhoun filed 45 grievances under the UPS union contract. Only the grievance relating to Calhoun's 2001-2002 suspensions and terminations resulted in any action. The joint labor-management grievance panel rendered the following decision:

This discharge is reduced to a 20 day suspension in order for the Grievant to recognize the seriousness of his actions and to bring about a change in his behavior. In the future, the Grievant is instructed to follow all his Supervisor's instructions, Company methods and procedures in the

¹²⁶ Tr. 317-19, 898-900, JX 24.

performance of his daily job responsibilities. This is a final warning. This decision set no precedent.¹²⁷

Calhoun's sole argument is that under the FMCSRs, he has the unlimited right to conduct a pre-trip inspection to his own specifications, to take as much time as he feels is necessary to convince himself that the truck is safe and to ignore the pre-trip inspection procedures mandated by UPS. This is not a reasonable interpretation. The ARB rejected this argument in *Calhoun I* stating "[t]here was a legitimate, nondiscriminatory reason proffered by UPS for initiating its action and Calhoun has not shown that this was pretext for discrimination."¹²⁸ UPS argues that the motive for its actions in 2001-2002 are the same as its motivations for disciplinary actions taken earlier and litigated in *Calhoun I*.¹²⁹ We agree.

There is overwhelming evidence in the record that UPS warned and suspended Calhoun and terminated his employment because he would not follow UPS's instructions or pre-trip inspection methods, would not take steps to reduce his start work times and would not cooperate with his supervisors. There is essentially nothing in the record and no solid legal analysis to support Calhoun's claim that UPS disciplinary actions were in retaliation for his protected activity. We therefore conclude that UPS's legitimate, nondiscriminatory reasons for taking disciplinary actions against Calhoun were not pretext. Because Calhoun has not proven that UPS retaliated against him for engaging in protected activity, we conclude that the ALJ's decision must be reversed and Calhoun's complaint denied.

CONCLUSION

Calhoun has failed to prove by a preponderance of the evidence that UPS either suspended or terminated his employment because he engaged in activities protected by the STAA, and we **DENY** his complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

¹²⁷ JX 35.

¹²⁸ *Calhoun I* at 12.

¹²⁹ UPS's Post Hearing Brief at 68